

**NAVY-MARINE CORPS TRIAL JUDICIARY
NORTHERN JUDICIAL CIRCUIT
NAVAL DISTRICT WASHINGTON
GENERAL COURT-MARTIAL**

1. Nature of Motion

CDR Benson, hereinafter the accused, moves this court to dismiss the charges in this case, arguing that the Convening Authority must be disqualified as a “type two” and “type three” accuser. 10 U.S.C. § 801(9), R.C.M. 504(c)(1), and R.C.M. 601(c). Specifically, the Defense argues (1) that LNC G.G. acted as a nominal accuser; and (2) that Admiral Caldwell’s “activities as the CDA [Consolidated Disposition Authority] made him a type three accuser.” AE LX. The Government moves this court to deny the Defense motion, arguing that the Defense failed to establish that the CDA acted impermissibly in this case. AE LXI. The court held an Article 39(a) hearing on this motion on 14 November 2018 at the Washington Navy Yard.¹ The court-martial is currently scheduled to begin in May 2019.

2. Issues

- a. Should Admiral Caldwell be disqualified as a type-two accuser?
 - b. Should Admiral Caldwell be disqualified as a type-three accuser?

3. Findings of Fact

In reaching its findings of fact and conclusions of law, the court considered all legal and competent evidence presented by the parties and the reasonable inferences to be drawn therefrom. Upon completing its review of the evidence provided by both parties, the court requested additional evidence to assist in its ruling. Specifically, the court requested a full copy of RDML Fort's Dual Purpose Investigation (DPI) report. Upon completing its review of the written DPI report, the court requested the following DPI enclosures: 24-28, 30, 35, 37, 39, 41, 43, 48, 58, 60, 65, 71, 76, 95, 136,

¹ In addition to the initial pleadings, the Defense filed a reply brief on 12 November 2018 (AE LXII) and supplemental matters for the court's consideration on 26 November 2018 (AE LXIX). In response, the Government filed supplemental matters for the court's consideration on 3 December 2018. The court considered all of the pleadings and their enclosures in making its ruling.

205, 211, 212, 213, and 214. The court also requested records of all of the initial non-judicial punishment (NJP) proceedings and administrative actions involving the accused and other USS FITZGERALD (DDG 62) (FTZ) Sailors. The court makes the following findings of fact in this case:²

a. On 28 July 2017, RDML Fort completed the DPI report, which included the following findings of fact regarding the circumstances surrounding the collision that occurred at 0130 on the morning of 17 June 2017 between FTZ and ACX CRYSTAL (ACX). (C Encl. 1.) RDML Fort conducted numerous investigative actions during the course of his investigation, preserving these actions as enclosures to his report. With respect to this particular motion, the court notes that RDML Fort completed the following investigative actions:

1. Reviewed FTZ's deck logs from February 2017 through 17 June 2017. The court has included the deck logs from May 2017 through 17 June 2017 as an enclosure. (C. Encl. 2.) After reviewing the deck logs, the court finds the following:
 - (a) The deck logs confirm that the accused assumed command of FTZ on 13 May 2017 while in Sasebo, Japan. (*Id.*)
 - (b) FTZ remained in Sasebo until 28 May 2017. (*Id.*)
 - (c) FTZ got underway on 28 May 2017 at 0906. (*Id.*) FTZ remained underway until 2 June 2017, when it moored in Sasebo at 1320. (*Id.*)
 - (1) According to the deck logs, the accused entered the pilot house approximately 18 times during the six-day underway. (*Id.*) According to the deck logs, he spent roughly 22 hours in the pilot house during this underway period. (*Id.*)
 - (2) He left the pilot house for good each night at 2011, 2030, NFI³, 0002, and 1938 during the underway period. (*Id.*)
 - (d) FTZ spent the night of 2 June 2017 in Sasebo and then got underway on 3 June 2017 at 0933. (*Id.*)
 - (e) FTZ remained underway until 7 June 2017, when it moored in Sasebo at 1825. (*Id.*)
 - (1) According to the deck logs, the accused entered the pilot house 11 times during the five-day underway period. (*Id.*) According to the deck logs, he spent roughly 16 hours in the pilot house during this underway period. (*Id.*)
 - (2) He left the pilot house for good each night at 1911, 1927, 1813, and 2205 during the underway period. (*Id.*)
 - (f) FTZ remained in Sasebo until 16 June 2017. (*Id.*)
 - (g) FTZ got underway on 16 June 2017 at 1825. The collision occurred at 0131 on 17 June 2017. (*Id.*)

² The court has cited to multiple sources in developing its findings of fact. In providing citations, the court has identified pertinent Government enclosures as G Encl., pertinent Defense enclosures as D Encl., and any additional enclosures included by the court as C Encl.

³ The deck log indicates that the accused last entered the pilot house at 1942 on 30 May 2017, but his departure that evening was not included in the log.

- (1) According to the deck logs, the accused entered the pilot house three times on 16 June 2017. (*Id.*) According to the deck logs, he spent approximately eight hours in the pilot house on 16 June 2017. (*Id.*)
- (2) He left the pilot house for good at 2300 on 16 June 2017. (*Id.*)
2. Interviewed LT N.C. – Tactical Action Officer at the time of the collision – on 21 June 2017. (C Encl. 3.)
 3. Interviewed LT I.W. – Surface Warfare Coordinator at the time of the collision – on 28 June 2017. (C. Encl. 4.)
 4. Interviewed LTJG S.C. – Officer of the Deck at the time of the collision – on 29 June 2017 and 11 July 2017. (C. Encls. 5 and 6.)
 5. Interviewed LTJG W.C. – Navigator – on 29 June 2017, 11 July 2017, 16 July 2017, and 18 July 2017. (C. Encls. 7, 8, 9, and 10.)
 6. Interviewed LT R.P. – Junior Officer of the Deck at the time of the collision – on 29 June 2017 and 11 July 2017. (C. Encls. 11 and 12.)
 7. Interviewed CMDCM B.B. – Command Master Chief at the time of the collision – on 30 June 2017. (C. Encl. 13.)
 8. Interviewed GMC J.O. on 1 July 2017. (C Encl. 14.)
 9. Interviewed ENS B.H. – Conning Officer at the time of the collision – on 3 July 2017. (C. Encl. 15.)
 10. Interviewed CDR R.S., FTZ’s previous Commanding Officer, on 11 July 2017. (C. Encl. 16.)

b. On 30 June 2017, Coast Guard investigators interviewed CDR S.B. – Executive Officer at the time of the collision. (C. Encl. 17.)

c. On 18 August 2017, Vice Admiral Aucoin – Commander, SEVENTH FLEET (C7F) at the time of the collision – imposed non-judicial punishment (NJP) on the accused for two specified violations of Article 92 and one violation of Article 110, UCMJ. 10 U.S.C. §§ 892, 910 (2012). (See Def. Mot. to Dismiss for Prior Art. 15 Punishment.) C7F awarded the accused a punitive letter of reprimand. (D Encl. E.) C7F also imposed NJP on the following personnel for their alleged roles in the collision: LT N.C.; LT I.W.; LT R.P.; LTJG S.C.; LTJG W.C.⁴; LTJG B.M. – Combat Information Center Watch Officer at the time of the collision; OS1 R.G. – Combat Information Center Watch Supervisor at the time of the collision; and FCAC J.J. – Combat Systems Maintenance Manager at the time of the collision. *Id.*

d. Additionally, C7F detached the following personnel for cause: the accused, CDR S.B.; LT N.C.; LT R.P.; LT I.W.; LTJG B.M.; and CMDCM B.B. (*Id.*)

e. On 21 August 2017, USS JOHN S. MCCAIN (DDG-56) (MCCAIN) collided with merchant vessel M/T ALNIC MC in Singapore Strait. (D Encl. B.) That day, the Chief of Naval Operations (CNO) announced that he had “directed a more comprehensive review to ensure that we get at the contributing factor, the root causes of these incidents [and] asked Admiral Phil Davidson – then-

⁴ On 19 October 2017, Commander, U.S. Pacific Fleet, set LTJG W.C.’s NJP aside and ordered a rehearing due to a procedural error that “materially prejudiced” LTJG W.C.’s rights. (D. Encl. E at 12; C. Encl. 12.)

Commander of U.S. Fleet Forces Command (FFC) – to take charge of that investigation.” (AE LIV, Encl. H at 2-3; D Encl. B.)⁵

f. CDR S.B., LT N.C., LT I.W., LT R.P., and LTJG W.C. provided statements in response to the various administrative actions that had been taken against them. (C Encl. 18.)

g. On 30 October 2017, at CNO’s direction, the Vice Chief of Naval Operations (VCNO) designated Admiral Frank Caldwell as the CDA “FOR ACCOUNTABILITY ACTIONS RELATING TO THE COLLISIONS AT SEA INVOLVING USS FITZGERALD (DDG 62) AND USS JOHN S. MCCAIN (DDG 56).” (D Encl. B.) ADM Caldwell was authorized to “review all relevant information, including accountability actions taken to date, and to take additional administrative or disciplinary actions as appropriate.” (*Id.*) VCNO further noted that all “CDA determinations are within your sole discretion and are to be based upon your independent professional judgment.” (*Id.*)

h. ADM Caldwell is currently serving in three billets. In August of 2015, he reported as the Director, Naval Nuclear Propulsion Program. (D. Encl. C.) In this billet, ADM Caldwell is a member of CNO’s staff. (D. Encl. D at 5-6.) In addition to these duties, ADM Caldwell serves as the Deputy Commander for Nuclear Propulsion (NAVSEA 08) and as Commander, Military Personnel Detachment, Office of Naval Reactors, Department of Energy. (AE LV, Encl. P.) ADM Caldwell was designated as the CDA in his billet as Commander, Military Personnel Detachment, Office of Naval Reactors, Department of Energy. (D Encl. B.)

i. In designating ADM Caldwell as the CDA, VCNO also appointed CAPT M.L., JAGC, USN, as ADM Caldwell’s senior legal advisor. (*Id.*)

j. On 1 November 2017, CNO released publicly releases his own report on the FTZ collision. (AE LIV, Encl. T.) On 2 November 2017, the Navy released portions of FFC’s Comprehensive Review. (AE LIV, Encl. U.)

k. ADM Caldwell had access to all available information to assist in his disposition decision. Specifically, he had access to RDML Fort’s DPI and its enclosures, access to all of the reports documenting the NJP and DFC decisions outlined above, and access to the reports released by CNO and FFC. (D Encl. E.) ADM Caldwell’s disposition decisions are reflected in the “Intended Action” portions of the Power Point slides he considered prior to making disposition decisions. (*Id.*) Though it seems likely that the “Intended Actions” had not yet occurred at the time the slides were drafted, the court notes that ADM Caldwell ultimately executed the “Intended Actions” as listed.

l. On 6 January 2018, ADM Caldwell sent VCNO an email explaining that he [ADM Caldwell] would sign out “my record of decisions” pertaining to his CDA determinations on 8 January 2018. (D Encl. G at 2.) On 11 January, ADM Caldwell informed VCNO that he [ADM Caldwell] had briefed the Secretary of the Navy (SECNAV) on his “CDA decisions and recommendations.” (D Encl. H at

⁵ On 24 August 2017, VCNO signed a letter directing FFC to conduct “a comprehensive review of surface fleet operations and incidents at sea that have occurred over the past decade with emphasis on SEVENTH Fleet operational employment.” (D Encl. B.)

4.) ADM Caldwell explained that he wanted to coordinate the release of information to ensure that families of the victims were informed prior to release of the information via public affairs. (*Id.*)

m. On 15 January 2018, charges against the accused, LT N.C., LT I.W., and LTJG S.C. were preferred. (D Encl. J.) C7F had previously imposed NJP against all four Sailors for their alleged misconduct related to the collision. (FF (c)). The rationale behind the disposition decisions in this case is outlined, in part, in the materials that ADM Caldwell considered prior to preferral of the charges. (D Encl. E.)

n. That same day, LNC G.G. also signed off on NJP charges against CDR S.B., CMDCM B.B., and LTJG W.C. (D Encl. K.) All three members were charged with one count of negligent dereliction of duty. (*Id.*) C7F had previously decided that CDR S.B. and CMDCM B.B. should be detached for cause rather than face any disciplinary action. (FF d)). C7F had already imposed NJP on LTJG W.C., but those findings had been set aside due to procedural errors. (FF (c)). The rationale behind these disposition decisions is also outlined in the materials that ADM Caldwell considered prior to preferral of the charges. (D Encl. E.)

o. LNC G.G. served as the accuser for the charges against the accused and his shipmates. (LNC G.G.'s 14 November 2017 testimony). She testified to the following:

1. LNC G.G. is currently assigned as the Executive Assistant to the Command Master Chief of the JAG Corps. (*Id.*)
2. LNC G.G. was assigned to provide paralegal support to the CDA staff upon request from CAPT M.L. (*Id.*)
3. LNC G.G. reviewed all of the available materials. (*Id.*) Specifically, she reviewed RDML Fort's DPI and all of its enclosures. She also reviewed multiple Navy instructions that she believed were relevant to the investigation. (*Id.*) She stated that she spent over a month looking at all of the materials. (*Id.*)
4. LNC G.G. forwarded an initial draft of the charges to CAPT M.L. on or about 21 November 2017. (G Encl. 4). The initial draft alleged two specifications of negligent dereliction of duty and one specification of hazarding a vessel in violation of Articles 92 and 110 of the Uniform Code of Military Justice (UCMJ). (*Id.*) She had not seen her draft of the charge sheet between the day she submitted it to CAPT M.L. and the date that charges were preferred against the accused. (LNC G.G.'s 14 November 2017 testimony.)
5. On 15 January 2018, LNC G.G. reported to the Navy Yard – at CAPT M.L.'s request – to sign the accuser block of the accused's charge sheet. (*Id.*) She stated that she reviewed the charges, and noted a few differences that she attributed to attorney edits. (*Id.*) She stated that the final charges were essentially the same as the ones she had drafted. (*Id.*) She did not have any hesitation swearing to the charges because she had reviewed "every single piece of evidence." (*Id.*) She did not ask any questions about the changes. (*Id.*) She did not review the DPI before swearing to the charges, despite the changes. (*Id.*) She testified that she must have believed the changes to be true at the time she swore to the charges. (*Id.*) The final preferred charge sheet alleged two specifications of negligent dereliction of duty, two specifications of

- hazarding a vessel, and one specification of negligent homicide in violation of Articles 92, 110, and 134 of the UCMJ. (Charge Sheet.)
6. LNC G.G. testified that she had met ADM Caldwell when she first reported to the CDA team, but never saw him again after that. (*Id.*) She testified that neither ADM Caldwell nor anyone else on the team directed her to prefer any specific charges. (*Id.*)
 7. LNC G.G. stated that the team had developed PowerPoint slides to assist in the CDA briefings about the personnel involved in the case. (*Id.*) LNC G.G. provided an initial template for the slides, but she did not provide any of the information included in the Power Point slides. (*Id.*) LNC G.G. did not use the PowerPoint slides to assist her when drafting the charges. (*Id.*)
 8. LNC G.G. initially stated that she was familiar with the elements associated with Charge III, but later conceded that she had not reviewed those elements prior to swearing to the charges. (*Id.*) However, she stated that she thought all of the evidence she had reviewed supported the Article 134 charge because it was similar to the charge of dereliction of duty resulting in death. (*Id.*)

p. Trial counsel spoke to CAPT M.L. prior to the scheduled NJP hearings for CDR S.B., CMDCM BB., and LTJG W.C. (14 November 2018 Motions Hearing, at timestamp 4:32 of the audio recording of the hearing.)⁶ Trial counsel informed the court that CAPT M.L. asked them if they wanted ADM Caldwell to ask any questions during the NJP hearings. (*Id.*) Trial counsel never received feedback as to whether the questions were asked. (*Id.*) Trial counsel confirmed that they were never part of the CDA legal team. Trial counsel provided the following two questions, or something similar, to CAPT M.L.:

1. If he [the accused] found out an OOD/JOOD was supposed to call him (e.g. close contact), and they didn't, was there any recourse? Did he even care? (*Id.*)
2. Whether the officers on the Bridge were comfortable calling the accused when they believed they needed to or did he tell them to leave him alone. (*Id.*)

q. On 25 January 2018, in Yokosuka, Japan, ADM Caldwell held a series of NJP hearings involving FTZ Sailors. (D Encl. K.) ADM Caldwell imposed punishment on CDR S.B., CMDCM B.B., and LTJG W.C. (*Id.*) They all received punitive letters of reprimand as punishment. (*Id.*)

1. CDR S.B.⁷ – According to the script of the NJP hearing, ADM Caldwell asked CDR S.B. 31

⁶ This corresponds with time 1406 on the day of the hearing.

⁷ CDR S.B. was charged with negligent dereliction of duty in violation of Article 92 from about March 2017 to on or about 17 June 2017, in that he “negligently reviewed and forwarded a watchbill with multiple errors; failed to implement mitigating measures for a fatigued watch team; failed to implement mitigating measures for degraded equipment; failed to properly train and maintain formal watchstanding practices; and, failed to maintain a command leadership presence for your crew post collision upon their return, as it was your duty as Executive Officer to assure proper watchbills are approved, supervise the ship’s crew, implement measures to minimize navigational risks, assure proper watchstanding practices and provide command leadership.” (*Id.* at 1.) On 25 June 2018, ADM Caldwell awarded CDR S.B. a punitive letter of reprimand that confirms that the struck-through language had been dismissed prior to imposition of punishment. (D Encl. M at 1.)

questions about CDR S.B.’s “experience on the FTZ and the causes of the collision.” (D Encl. L at 3-6.) These questions included questions about the ship’s schedule on the day of the collision, concerns about crew fatigue, equipment issues at the time of the collision, training protocols regarding watchstanding and the Rules of the Road, existing watchstanding deficiencies, and concerns about traffic density. (*Id.*) According to the script, ADM Caldwell also specifically asked CDR S.B. the following questions about the accused:⁸

- (a) Was the CO often present on the Bridge?
 - (b) Were officers comfortable calling him [the accused] to the Bridge?
 - (c) If he [the accused] found out an OOD/JOOD was supposed to call him (e.g. close contact), and they didn’t, was there any recourse? Did he even care?
 - (d) Was there a culture of “letting the CO sleep” at night and not wanting to bother him?
 - (e) Although only back onboard 90 days⁹, had the CO insisted on requals or pulled any watchstander’s qual? (*Id.*)
2. CMDCM B.B.¹⁰ – According to the script of the NJP hearing, ADM Caldwell asked CMDCM B.B. 30 questions about CMDCM B.B..’s “experience on the FTZ and the causes of the collision.” (D Encl. L at 8-13.) These questions included questions about the ship’s schedule on the day of the collision, concerns about crew fatigue, watchstanding protocols in CIC, communications expectations between the Bridge and CIC, training regarding berthing egress, morale amongst the CPO Mess, and any disciplinary actions taken for watchstanding deficiencies. (*Id.*) According to the script, ADM Caldwell also specifically asked CMDCM B.B. the following questions about the accused:
- (a) What was the presence of leadership on the Bridge and CIC?
 - (b) How often was leadership present on the Bridge during the mid-watch?
 - (c) How often did you go the Bridge during the mid/rev watch?
 - (d) Why do you think the CO and XO left the Bridge without putting risk mitigators in place that could have prevented the collision? (*Id.*)
3. LTJG W.C.¹¹ – According to the script of the NJP hearing, ADM Caldwell asked LTJG W.C. 32 questions about LTJG W.C.’s “experience on the FTZ and the causes of the collision.” (D Encl. L at 14-19.) These questions included questions about LTJG W.C.’s familiarity with the operating area, discussions he had with the CO and XO about the transit, steps taken to ensure that watchstanders were aware of the potential for high contact density, errors that existed in

⁸ The court notes that questions (b)-(d) are very similar to the questions posed by the trial counsel.

⁹ The court notes that the accused assumed command on 13 May 2017, 35 days prior to the collision.

¹⁰ CMDCM B.B. was charged with negligent dereliction of duty in violation of Article 92 from about January 2016 to on or about 17 June 2017, in that he “negligently failed to be vigilant in inspecting the conduct of subordinate personnel; failed to implement mitigating measures for fatigued, inexperienced watchstanders; failed to properly train and maintain proper watchstanding practices; and, failed to maintain a command leadership presence for your crew post-collision upon their return as it was your duty as Command Master Chief to supervise the ship’s crew, assure proper watchstanding procedures and provide command leadership.”

¹¹ LTJG W.C. was charged with negligent dereliction of duty in violation of Article 92 on or about 17 June 2017, in that he “negligently failed to notify the Commanding Officer and Watch Team of possible heavy traffic in the vicinity of the traffic separation scheme, failed to provide proper guidance on fix interval based on speed and proximity to land, and provided a deficient Navigation Brief, as it was your duty as Navigator to advise the vessel on ship movements and safe course of navigation.” (*Id.* at 14.)

the navigation brief, training LTJG W.C. had implemented regarding Rules of the Road, and concerns about the fix intervals when considered in conjunction with the ordered speed and proximity to land. (*Id.*) According to the script, ADM Caldwell also specifically asked LTJG W.C. the following questions about the accused:

- (a) Describe the CO's presence on the bridge normally.
- (b) Describe how the officers felt about contacting the CO and calling him to the Bridge.
- (c) If he [the accused] found out an OOD/JOOD was supposed to call him (e.g. close contact), and they didn't, was there any recourse? Did he even care?
- (d) Was there a culture of "letting the CO sleep" at night and not wanting to bother him?
- (e) Although only back onboard 90 days, had the CO insisted on requals or pulled any watchstander's qual? (*Id.*)

r. On 6 March 2018, in between the preferral and referral of charges in this case, ADM Caldwell submitted a letter to the Chief of Naval Personnel recommending show-cause proceedings for CAPT J.B. (D Encl. Q.) At the time of the collision, CAPT J.B. had been the Commander of Destroyer Squadron FIFTEEN. (*Id.*) In that billet, CAPT J.B. was the Immediate Superior in Command (ISIC) responsible for FTZ and MCCAIN. (*Id.*) On 18 September 2017, VADM Sawyer – the current C7F – had requested that CAPT J.B. be detached for cause due to a loss of confidence as a result of the FTZ collision. (*Id.* at 19). However, C7F wrote that he did not believe disciplinary action or a show-cause hearing was warranted because he believed that CAPT J.B. "had potential for future Naval Service not involving major command." (*Id.*) In submitting his recommendation to show-cause, ADM Caldwell cited his authority as the CDA to "review all relevant information, including accountability actions taken to date, and to take additional administrative or disciplinary actions as appropriate." (*Id.* at 10). Despite recommending a show-cause proceeding, ADM Caldwell determined that disciplinary action against CAPT J.B. was not appropriate, because "ultimately the commanding officers and other members of [FTZ] and [MCCAIN] were directly responsible for, and could have prevented, the collisions." (*Id.* at 12).

s. ADM Caldwell referred charges against the accused on 18 June 2018. Specification 2 of Charge II and Charge III were dismissed prior to referral. (Charge Sheet at 3.)

t. ADM Caldwell dismissed Specification 2 of Charge I on 27 September 2018. (Charge Sheet at 1.)

4. Principles of Law

Every accused is entitled to have his or her case handled by an unbiased and impartial Convening Authority (CA). *United States v. Schweitzer*, 2007 CCA LEXIS 164, *9 (N-M. Ct. Crim. App. 2007). The CA should not have prosecutorial motives when disposing of a case. *Id.*; see also *United States v. Kelley*, 2001 CCA LEXIS 243, *8-9 (N-M. Ct. Crim. App. 2007). However, as a general rule, administrative actions taken in the same case will not render a convening authority an accuser, as long as they are taken in an official capacity. *Kelly*, 2001 CCA LEXIS at *9.¹² Convening

¹² Citing *United States v. Conn*, 6 M.J. 351, 354 (C.M.A. 1979) (holding that the convening authority is not disqualified by performing command functions, such as being briefed on the investigation, reading the witness statements,

authorities are presumed to act without bias. *See United States v. Argo*, 46 M.J. 454, 463 (C.A.A.F. 1997); *United States v. Brown*, 40 M.J. 625, 629 (N.M.C.M.R. 1994). The accused has the burden of rebutting this presumption. *Argo*, 46 M.J. at 463 (citing *United States v. Hagen*, 25 M.J. 78, 84 (C.M.A. 1987)). The standard of proof to overcome this burden is a preponderance of the evidence. *United States v. Ortiz*, 2018 CCA LEXIS 73, *7 (N.M. Ct. Crim. App. 2018).

Article 1(9), UCMJ, defines an “accuser” as: (1) a person who signs and swears to charges (“type one” accuser); (2) any person who directs that charges nominally be signed and sworn to by another (“type two” accuser); and (3) any other person who has an interest other than an official interest in the prosecution of the accused (“type three” accuser). 10 U.S.C. § 801(9); *United States v. Ashby*, 68 M.J. 108, 129 (C.A.A.F. 2009); *United States v. Jeter*, 35 M.J. 442 (C.M.A. 1992). An accuser may not convene a general or special court-martial for the trial of the person accused.” R.C.M. 504(c)(1); R.C.M. 601(c); *Schweitzer*, 2007 CCA LEXIS 164 at *9.

The test for determining whether a CA is a “type two” accuser is whether the CA “directed a subordinate to act as his alter ego in preferring charges.” *United States v. Allen*, 31 M.J. 572, 585 (N.M.C.R. 1990)).

The test for determining whether a CA is a “type three” accuser is whether he is so closely connected to the offense that a reasonable person would conclude that he has a personal interest in the matter. *United States v. Dinges*, 55 M.J. 308, 312 (C.A.A.F. 2001); *United States v. Voorhees*, 50 M.J. 494, 499 (C.A.A.F. 1999) (quoting *United States v. Jackson*, 3 M.J. 153, 154 (C.M.A. 1977)).

Disqualifying personal interests include those matters that would directly affect the CA’s ego, family, property, and similar personal interests. *Voorhees*, 50 M.J. at 499. An “interest in an incident and the investigation thereof is not personal – it is in fact the responsibility of a commander.” *Ashby*, 68 M.J. at 130.¹³ In assessing whether the CA is a “type three” accuser, the court must “assess the unique and particular facts and circumstances of the case before it to determine whether a ‘reasonable person would impute to [the CA] a personal feeling or interest in the outcome of the litigation.’” *Ortiz*, 2018 CCA LEXIS 73 at *9-10 (citing *Conn*, 6 M.J. at 354).

5. Conclusions of Law

a. The Defense failed to establish by a preponderance of the evidence that ADM Caldwell should be disqualified as a “type two” accuser.

1. The record is devoid of any evidence that suggests that ADM Caldwell “directed” LNC G.G. to act as his alter ego in preferring charges. ADM Caldwell was appointed as the CDA on 30 October 2017. (FF (g)). CAPT M.L., JAGC, USN, was assigned to assist ADM Caldwell. (FF (i)). CAPT M.L. requested paralegal support for the CDA team, which led to LNC G.G.’s assignment to the

conferencing with the staff judge advocate and trial counsel, directing the accused’s immediate arrest, and ordering a helicopter to accomplish the arrest).

¹³ See also *Schweitzer*, 2007 CCA LEXIS 164 at * 18 (noting CAs are required to make disposition and referral decisions on a regular basis, which may preclude absolute neutrality on the part of the CA).

team. (FF (o)). LNC G.G. testified that she met ADM Caldwell when she was first assigned to the team, but never met with him again. (*Id.*) Once she was assigned to the team, LNC G.G. reviewed the DPI and all of its enclosures. (*Id.*) LNC G.G. drafted proposed charges and provided them to CAPT M.L. on 21 November 2017. (*Id.*) She never discussed the evidence with ADM Caldwell nor received any guidance from anyone as to potential charges. (*Id.*)

2. LNC G.G. swore to the alleged charges against the accused on 15 January 2017. (FF (m), (o)). She reported to the Washington Navy Yard at CAPT M.L.’s request. (FF (o)). Prior to swearing to the charges, LNC G.G. reviewed the charge sheet. (FF (o)). She noticed that some of the language had been altered from her draft charges, but attributed those changes to the attorneys on the CDA team. (*Id.*)

3. R.C.M. 307(a) states that any person subject to the code may prefer charges. R.C.M. 307(a). The discussion section reminds us that no person may be ordered to prefer charges to which that person is unable to “make truthfully the required oath.” *Id.* (Discussion). LNC G.G. testified that she had initially drafted two specifications alleging violations of Article 92 and one specification alleging a violation of Article 110 based on her extensive review of the DPI and its enclosures. (FF (o)). The Defense argues that LNC G.G. did not swear to the charges until after ADM Caldwell informed VCNO of his “decision” regarding the disposition of the accused’s case. (FF (l)). While true, this ignores the fact that LNC G.G. had drafted similar charges two months prior to the preferral date, without any outside direction. (*Id.*) Though the charges she ultimately preferred were different than the ones she drafted, she did not have any hesitation swearing to the amended charges because of her familiarity with the evidence and the similarity to the charges she had drafted. (*Id.*) ADM Caldwell never spoke to her about the case, nor did he convey any thoughts about the case to LNC G.G. through his legal team. (*Id.*) See *Schweitzer*, 2007 CCA LEXIS 164 at *17. The fact that ADM Caldwell, “made a disposition decision does not make the decision maker an accuser.” *United States v. Black*, 2006 CCA LEXIS 104, *8 (N-M. Ct. Crim. App. 2006); see also *Schweitzer*, 2007 CCA LEXIS 164 at *17 - *18.

4. In *Schweitzer*, the N.M.C.C.A. dealt with a similar case involving a tragic international incident that resulted in the deaths of 20 civilians after a Marine Corps EA-6B prowler, “flying at exceptionally low levels through the Italian Alps,” impacted and severed suspension cables supporting a gondola that was part of the Alpes Cermis cable car system. *Id.* at *2. In that case, the CA convened the initial Command Investigation Board (CIB), suggested two additional avenues of investigation,¹⁴ directed an Article 32 hearing upon completion of the CIB, and ultimately convened a General Court-Martial. *Schweitzer*, 2007 CCA LEXIS 164 at *8. The appellant argued that the CA’s active interest in the CIB’s progress and final report, combined with the coincidental language of the preferred charges to those charges that the CA had endorsed in the initial CIB report, indicated that subordinate personnel had merely acted as the CA’s alter ego in preferring the charges the CA directed. *Id.* at *15. The court disagreed, citing Article 6(b) of the UCMJ, and found nothing improper in the fact that the CA had consulted with his legal staff and commented on the administrative CIB report regarding charges that might flow from the mishap. *Id.* at *16. The court stated that it “is axiomatic that a CA must make certain preliminary ‘probable cause’ determinations

¹⁴ See *Ashby*, 68 M.J. at 125.

before determining whether criminal charges under the UCMJ should be forthcoming in any case and what their ultimate disposition should be. *Id.* at *17. The court found that there was no evidence that the CA had ever directed the preferral of any specific charges against the accused. *Id.*

5. The Court of Appeals of the Armed Forces dealt with the same issues in *Schweitzer*'s companion case. *Ashby*, 68 M.J. at 129-130. The court agreed with the lower court's finding that the CA took "no actions equivalent to directing that charges nominally be signed and sworn to by another." *Id.* at 130.

6. ADM Caldwell did not order the DPI that led to the charges in this case. The DPI was completed three months prior to his designation as the CDA. (FF (a)). ADM Caldwell did not direct LNC G.G. to prefer specific charges, nor did he ever speak to her about her proposed charges. (FF (o)). Therefore, the court finds that LNC G.G. acted of her own accord in drafting, and ultimately preferring, the charges in this case, precluding a finding that ADM Caldwell must be disqualified as a "type two" accuser with respect to Charge I and its underlying specifications and Specification 1 of Charge II.

7. As to the remaining specifications, LNC G.G.'s draft Charge Sheet did not include Specification 2 of Charge II, or an allegation of negligent homicide as alleged in Charge III, but she testified that she felt that the evidence supported the added allegations. (*Id.*) With respect to Charge III, she testified that she felt comfortable swearing to an allegation of negligent homicide because the charge was similar to dereliction of duty resulting in the deaths of seven Sailors charge that she initially proposed. (*Id.*) She conceded that she had not reviewed the elements of Specification 2 of Charge II or Charge III prior to swearing to the Charge Sheet. (*Id.*) Assuming *arguendo* that that these two allegations were improperly preferred, the issue with respect to these allegations is not before the court because the CA ultimately declined to refer Specification 2 of Charge II and Charge III. (FF (s)).

b. The Defense has established by a preponderance of the evidence that ADM Caldwell should be disqualified as a "type three" accuser.

1. The Defense argues that ADM Caldwell should be disqualified as a "type three" accuser because his actions with respect to public affairs throughout the process and as a purported investigator during the 25 January 2018 NJP hearings fell outside the scope of his official duties.

2. The test for whether the CA should be disqualified as a "type three" accuser is whether he is so closely connected to the offense that a reasonable person would conclude that he has a personal interest in the matter. *Dinges*, 55 M.J. at 312. Disqualifying personal interests include those matters that would directly affect the CA's ego, family, property, and similar personal interests. *Voorhees*, 50 M.J. at 499. Additionally, the CA should not have prosecutorial motives when disposing of a case. *Schweitzer*, 2007 CCA LEXIS 164 at *9; see also *United States v. Kelley*, 2001 CCA LEXIS 243, *8-9 (N-M. Ct. Crim. App. 2007). In assessing whether the CA is a "type three" accuser, the court must "assess the unique and particular facts and circumstances of the case before it to determine

whether a ‘reasonable person would impute to [the CA] a personal feeling or interest in the outcome of the litigation.’” *Ortiz*, 2018 CCA LEXIS 73 at *9-10 (citing *Conn*, 6 M.J. at 354).

(a) ADM Caldwell’s actions pertaining to public affairs were within the scope of his official duties.

3. Article 22 of the Uniform Code of Military Justice authorizes who may convene general court-martial. 10 USC § 822(a) (2012). The list includes “any other commanding officer designated by the Secretary concerned.” 10 USC § 822(a)(8) (2012). ADM Caldwell was designated as the CDA in his billet as Commander, Military Personnel Detachment, Office of Naval Reactors, Department of Energy. (FF (h)). On 15 January 2014, SECNAV issued a memorandum stating that the Military Personnel Detachment, Office of Naval Reactors, Department of Energy is an established Navy unit. (AE LVII, D Encl. F). In the memorandum, SECNAV wrote, “[a]s a flag officer in command of a Navy unit, you and your successors in command are authorized to convene general courts-martial pursuant to Article 22(a)(8) of the Uniform Code of Military Justice and JAG Instruction 5800.7F, Manual of the Judge Advocate General [JAGMAN], paragraph 120(a)(1).¹⁵ This authority continues to remain in effect until withdrawn by the Secretary of the Navy or the unit is disestablished.” *Id.* ADM Caldwell assumed this billet in August 2015. (FF (h)). Assuming *arguendo* that SECNAV had the authority to designate the billet as a separate unit, there is no evidence that the authority had ever been revoked. For the purposes of this ruling, the court presumes that the designation was valid, and that ADM Caldwell was authorized to convene a general court-martial pursuant to Article 22(a)(8).

4. “Public information and access to military judicial proceedings promote public awareness and confidence in the military justice system.” JAGMAN, 0142(a). In issuing public statements about military justice matters, however, CAs must strike a fair balance between the rights of the accused, the public interest, and the interests of the Navy, “with emphasis in that order.” SECNAVINST 5720.44C; *see also* JAGMAN, 0142(a). Failure to use sound judgment in striking this balance could – as the Defense points out – “place an enormous strain on the ability of the military justice system to provide accused servicemembers fair and impartial trials.” *United States v. Simpson*, 55 M.J. 674, 688 (A. Ct. Crim. App. 2001).

5. The court finds that ADM Caldwell did not step outside of his official duties in coordinating public affairs efforts in conjunction with the preferral of charges in the accused’s case. The Defense argues that ADM Caldwell participated in a Pentagon-driven media campaign and highlights

¹⁵ In addition to those officers authorized to convene general courts-martial by Article 22(a)(5) through (7) and (22)(a)(9), UCMJ, the Secretary of the Navy, acting under Article 22(a)(8), UCMJ, has authorized the following officers, when in an active duty or inactive-duty training status, to convene general courts-martial: All flag or general officers, or their immediate temporary successors, in command of units or activities of the Navy or Marine Corps. Designation as a separate and detached command, in accordance with U.S. Navy Regulation 0723, does not, by itself, convey authority to convene general courts-martial. Flag or general officers in command of units or activities that have been designated as separate and detached commands may request such authority in accordance with section 0121. A list of general courts-martial authorities designated by the Secretary is maintained by OJAG (Code 20) or HQMC (JA), as appropriate.” JAGINST 5800.7F, 0120(a)(1)(2012).

problematic statements made by other senior flag officers regarding the accused's court-martial.¹⁶ There is no evidence that ADM Caldwell has issued any statements that failed to strike a proper balance between the aforementioned interests. The record demonstrates that ADM Caldwell's efforts were designed to ensure that the families of the victims were properly informed before his disposition decisions were made public. (FF (l)). The court finds that these efforts fell within ADM Caldwell's official duties as the CDA in this case. *See Schweitzer*, 2007 CCA LEXIS 164 at *17-18.

- (b) ADM Caldwell acted outside the scope of his official duties when (1) he questioned CDR S.B., CMDCM B.B., and LTJG W.C. about the accused during their NJP hearings, which were held after charges had been preferred, but not yet referred, against the accused; and (2) when he commented on the accused's guilt in a show-cause recommendation that pertained to a separate officer.

6. Charges were preferred against the accused on 15 January 2018. (FF (m)). On the very same day, NJP charges were sworn against CDR S.B., CMDCM B.B., and LTJG W.C. (FF (n)). On 25 January 2018, ADM Caldwell personally conducted NJP hearings for the three Sailors in Yokosuka, Japan. (FF (q)).¹⁷ A script for each hearing had been prepared prior to 25 January 2018. (*Id.*) The scripts were different for each Sailor. (*Id.*) Each script contained roughly 30 questions that ADM Caldwell intended to pose to each Sailor. (*Id.*) As indicated by the notes taken on each document, ADM Caldwell used the scripts during the respective hearings. (*Id.*) ADM Caldwell asked CDR S.B., CMDCM B.B., and LTJG W.C. five, four, and five questions, respectively, about the accused during their hearings.¹⁸ (*Id.*) Trial counsel provided at least two of these questions to CAPT M.L. prior to the hearings. (FF (p)).

7. The Defense argues that in asking these questions, ADM Caldwell impermissibly abdicated his neutral role to develop evidence against the accused. The Defense argues that these questions were investigative inquiries into the accused that had no bearing on the resolution of the Sailors' respective NJP hearings. In response, the Government opined that the CA was "presumably doing what we would hope a commander would do in his position" to understand any potential defenses or

¹⁶ The court has already addressed the actions of other senior officials in its previous ruling denying the Defense Motion to Dismiss due to unlawful command influence. The court notes that the Defense has filed a Motion to Reconsider its previous ruling, and the Defense will be given an opportunity to address potential reconsideration at the next motions hearing if requested.

¹⁷ "If authorized by regulations of the Secretary concerned, a commanding officer exercising general court-martial jurisdiction or an officer of general or flag rank in command may delegate his powers under this article to a principal assistant." 10 U.S.C. § 815(a). "After receiving written approval from the Chief of Naval Personnel or the Commandant of the Marine Corps, a flag or general officer in command may delegate all or a portion of his or her non-judicial punishment authority to an officer on his or her staff who is eligible to succeed to command in case of the absence of such officer in command. The designee will hold the same non-judicial punishment authority as the flag or general officer who delegated the authority." JAGMAN § 0106(c). ADM Caldwell is a member of CNO's staff, though not in the billet through which he was designated the CDA. (FF (h)).

¹⁸ ADM Caldwell asked CMDCM B.B. about the presence of "leadership" on the Bridge and in CIC, and how often "leadership" was present on the Bridge during mid-watch. While it's possible that these questions also included CMDCM B.B. as part of the leadership team, the court notes that ADM Caldwell also asked CMDCM B.B. how often he specifically went to the Bridge during mid-watch, suggesting that the first two questions were focused on the accused and the CDR S.B.

extenuating or mitigating factors that could potentially impact the Sailors facing NJP. The Government did not present any evidence to support this assumption.

8. The Defense correctly cites Article 6(c) and 27(a)(2) as authority that no person who has acted as an investigating officer in a case may subsequently act as a staff judge advocate, legal officer, or a trial counsel in the same case. 10 U.S.C. §§ 806(c), 827(a)(2). However, these statutory provisions do not address convening authorities. Article 22(b) addresses disqualification of convening authorities by mandating that if the commanding officer is an accuser, the court shall be convened by superior competent authority. 10 U.S.C. § 822(b); *see also* R.C.M. 307(a), 504(c)(1), 601(c). In *Schweitzer* and *Ashby*, our superior courts held that although the CA in those cases was “involved in the preliminary investigation of the case,” his interest appeared to have been wholly official. 2007 CCA LEXIS 164 at *20; 68 M.J. at 130. In *Ashby*, the C.A.A.F. affirmed the proposition that interest in an incident and the investigation thereof “is not personal – it is in fact the responsibility of the commander.” *Ashby*, 68 M.J. at 130.

9. In *Schweitzer*, the N.M.C.C.A. also addressed the “type three” accuser issue and found that the CA had not abdicated his official role.¹⁹ In so doing, the court considered the following assertions by the appellant regarding the CA’s actions: the CA convened the CIB; the CA made daily phone calls to the President of the CIB regarding the status of the investigation; the CA edited and subsequently endorsed the CIB recommendations; the CA’s Staff Judge Advocate was involved in the CIB process, drafted the charges, and monitored the progress of the trial; the CA purportedly faced “political heat” due to the nature of the tragedy; and the CA expressed his opinion about the appellant’s guilt “quite literally...to the world,” prior to preferral of the charges. 2007 CCA LEXIS 164 at *20-21.

10. The court found the aforementioned allegations to be without merit. The court acknowledged that the CA was “intensely interested in the proceedings,” due to his responsibility to ensure that the incident was thoroughly investigated. *Id.* at *21. The court noted that the CIB was an administrative investigation as opposed to a “proceeding conducted under the UCMJ.” *Id.* at *22. The court found that the phone calls were reasonable to allow the CA to stay abreast of the incident so that he could brief others with a need to know. *Id.* The court found that the CA’s interest in the CIB report reflected the need to ensure that every word was clear, and understandable to the lay reader. *Id.* The court noted that there was no evidence in the record supporting any inference that the CA had expressed an opinion about the appellant’s guilt to anyone. *Id.* at *23. The court found that the CA’s subsequent endorsement of the CIB report was an official act. *Id.* at *24. In its supplemental filing, the Government cites *Ashby* for the proposition that ADM Caldwell did far less than the CA in *Ashby*, mandating a similar result. The court agrees that ADM Caldwell did not have any impact on the initial DPI, as he was not appointed until after its completion. As stated above, the court finds that ADM Caldwell’s efforts to keep the chain of command and public affairs personnel informed were reasonable given the nature of the incident and his responsibilities as the CA. The court finds that ADM Caldwell’s decisions regarding disposition of the charges against the accused and the other FTZ sailors were also official actions required of a CA. In evaluating ADM Caldwell’s actions up to 25 January 2018, the court finds that he had not yet abdicated his official and neutral role as the CA.

¹⁹ The court relies on the facts in *Schweitzer* as they were more fully developed than the facts in the *Ashby* opinion regarding the accuser issue.

11. In considering the unique and particular facts of this case, the court finds that ADM Caldwell first stepped outside his neutral role when he conducted the NJP hearings on 25 January 2018. The Defense argues that ADM Caldwell's questions to CDR S.B., CMDCM B.B., and LTJG W.C. about the accused did not reasonably relate to the Sailors' specific hearings. ADM Caldwell asked specific questions about the accused, at least two of which were at the behest of trial counsel. (FF (p), (q)). The Government opines – without providing evidence – that these questions were designed to assess the relative culpability of the Sailors facing NJP. The court disagrees for the reasons outlined below.

(a) CDR S.B. was charged with negligent dereliction of duty from March 2017 until June 2017 for multiple alleged failures pertaining to training, crew fatigue, a lack of mitigating measures for degraded equipment and navigational risks, and a lack of training regarding proper watchstanding practices. (FF (q)). The court agrees that the questions regarding any discussions between CDR S.B. and the accused about mitigating measures in light of equipment degradations related to CDR S.B.'s alleged offense. However, the court finds that questions about the how often the accused was present on the Bridge, what the accused would do if he learned that a watchstander had failed to call him as mandated by the standing orders, or alternatively, whether the accused would even care if he did learn of such a violation, and whether officers were comfortable calling the accused to the Bridge did not relate to CDR S.B.'s alleged offense. Given that two of the questions came from the counsel prosecuting the accused, who had no interest in CDR S.B.'s NJP proceeding, the court finds that these questions were designed to gather evidence for the accused's court-martial rather than assess CDR S.B.'s relative culpability.

(b) CMDCM B.B. was charged with negligent dereliction of duty from January 2016 to June 2017 for failing to inspect the conduct of subordinate personnel, failing to implement measures for fatigued personnel, failing to train and maintain proper watchstanding practices, and failing to maintain a leadership presence post-collision. (*Id.*) The court finds that questions regarding the accused's presence on the Bridge and in CIC during throughout the day do not have any connection to CMDCM B.B.'s alleged failure to inspect the conduct of subordinate personnel, to properly train watchstanders, or to maintain a leadership presence post-collision. The court also finds that the question regarding why the accused and the XO left the Bridge without putting risk mitigators in place that could have prevented the collision goes directly to the potential culpability of the accused and the XO and not CMDCM B.B.'s alleged failure to inspect the conduct of subordinate personnel, to properly train watchstanders, or to maintain a leadership presence post-collision. Though these questions were not provided by the trial counsel, the court finds that these questions were designed to gather evidence for the accused's court-martial rather than assess CMDCM B.B.'s relative culpability.

(c) LTJG W.C. was charged with negligent dereliction of duty on or about 17 June 2017 for failing to notify the accused and watch team of potential heavy traffic in the vicinity of the traffic separation scheme, failing to provide proper guidance on fix intervals based on speed and proximity to land, and for providing a deficient Navigation Brief. (*Id.*) The court finds that the highlighted questions had no relation to LTJG W.C.'s alleged failure to warn the accused about the potential traffic density on the night in question, fix intervals, or the defective Navigation Brief on 17 June 2017. Given that two of the questions came from the counsel prosecuting the accused, who had no

interest in LTJG W.C.'s NJP proceeding, the court finds that these questions were designed to gather evidence for the accused's court-martial rather than assess LTJG W.C.'s relative culpability.

(d) The court notes that ADM Caldwell had ample access to evidence that answered the highlighted questions long before he conducted the NJP hearings. (FF (k)). RDML Fort's DPI had already explored the highlighted questions, removing the need to ask the questions again at the hearings. For example, the deck logs sufficiently account for how many times the accused visited the Bridge upon his assumption of command. (FF (a)). The logs indicate how much time the accused spent on the Bridge during the 11 days he spent underway as the CO, and the times at which the accused left the Bridge every evening.²⁰ (*Id.*)²¹ The DPI included statements from multiple officers regarding their opinions about the accused's leadership style and availability to watchstanders. (*Id.*)²¹ In addition to the DPI, ADM Caldwell had access to FFC's report and conclusions regarding the collision. (FF (j)). ADM Caldwell had access to CDR S.B.'s interview with Coast Guard investigators, which included answers to the highlighted questions.²² (FF (b)). ADM Caldwell also had access to all of the records pertaining to the original NJP and DFC actions, including the Sailors' statements in response to the actions imposed by VADM Aucoin. (FF (c), (d), (f)). The court finds that the fact that all of this information was available prior to the NJP hearings cuts against the Government's argument that answers to the highlighted questions were needed to assess relative culpability. ADM Caldwell had the resources available to answer his questions without inserting himself into the investigative process, yet he chose to ask the questions anyway. The court finds that the only reasonable explanation was that the questions indicated an attempt to elicit further evidence against the accused, who was already facing a court-martial.

12. The court finds that the facts outlined above distinguish the case at bar from *Schweitzer*. In *Schweitzer*, the court held that the CA's intense interest in the CIB process was permissible because the CIB was an administrative process, not a proceeding covered by the UCMJ. 2007 CCA LEXIS

²⁰ The accused was TAD from the ship from 11 March 2017 until 12 May 2017 while completing the PCO training pipeline. (AE X, Defense Notice of Alibi Defense). He had been onboard 35 days prior to the collision, only 11 of which were spent underway. (FF (a)).

²¹ For example, LT N.C. told investigators that "the CO and XO cycled through the bridge and combat on a regular basis;" LT I.W. told investigators that some people were afraid to call the accused while on watch, but he [LT I.W.] had no issues with calling the accused, he also said that the accused would sometimes yell to make spot corrections but then calm down and talk about the problem; LT S.C. told investigators that she never had an issue calling the accused, but that she did not expect to see him on the Bridge at night; LTJG W.C. told investigators that the accused was a hands-on CO who loved being on the Bridge whenever he had free time, but that the accused did not come up to the Bride during the night; LT R.P. told investigators that the previous CO had been more laid back and that the accused had changed the routine so that he only took contact reports from the OOD as opposed to the JOOD; GMC J.O. told investigators that he would not typically see the accused on the Bridge at night; and ENS B.H. told investigators that the accused was more involved and interactive with the Bridge team than his predecessor, that the accused was constantly making rounds though typically not from 2200-0600, and that he [ENS B.H.] did not believe the OOD had any problems calling the accused;. (C Encls. 3, 4, 5, 7, 11, 14, 15.)

²² CDR S.B. told investigators: (1) that he believed the accused received calls during the night on a regular basis; (2) that he was not aware of any impediments to Bridge watchstanders calling the accused to make contact reports; and (3) that he believed the accused visited the Bridge during each watch during the day, but was unsure how often the accused visited the Bridge during the mid-watch. (C Encl.17.)

164 at *22.²³ The court finds the facts in this case are distinguishable and thus mandate a different result. The court finds that the charges were properly preferred against the accused on 15 January 2018. The court finds that ADM Caldwell's decision to take CDR S.B., CMDCM B.B., and LTJG W.C. to NJP was also proper given his designation as the CDA.²⁴ Had ADM Caldwell completed the NJP hearings without asking the highlighted questions about the accused, there would have been no issue. However, the court finds that as soon as ADM Caldwell used the NJP process as a potential discovery tool seeking additional evidence against the accused that was unrelated to the NJP hearings, he impermissibly adopted a prosecutorial role rather than a neutral role. At that point, the court finds that his actions could no longer be deemed "official." *See id.* at *24. The court finds that one key fact distinguishing this case is the timing of the action. Unlike *Schweitzer*, ADM Caldwell's inquiries about the accused during the NJP hearings occurred after preferral of charges against the accused, not before.

13. On 6 March 2018, three months prior to referral of charges against the accused, ADM Caldwell opined that the accused was guilty when he submitted his show-cause recommendation for CAPT J.B. (FF (r)). In his recommendation, ADM Caldwell states that the "commanding officers and other members of FTZ and MCCAIN were directly responsible for, and could have prevented, the collisions." (*Id.*) The court finds that ADM Caldwell's proclamation of the accused's guilt also distinguishes this case from *Schweitzer*. ADM Caldwell chose to provide his recommendation based on the authority granted to him when designated as the CDA. (*Id.*) The court acknowledges that ADM Caldwell's show-cause recommendation was provided in an administrative setting, similar to the CA's CIB endorsement that was upheld in *Schweitzer*. 2007 CCA LEXIS 164 at *22. If ADM Caldwell had omitted any mention of the accused in his recommendation, the would be no issue. However, the *Schweitzer* court specifically noted that lack of evidence that the CA had ever expressed any opinion as to the mishap crew's guilt or innocence. *Id.* at *23. While complete and absolute neutrality is neither realistic nor required from a CA under the UCMJ, the court finds that ADM Caldwell's pronouncement of the accused's guilt further demonstrates that he had assumed a prosecutorial role in this case.

14. After assessing the unique and particular facts and circumstances presented, the court finds that ADM Caldwell was disqualified as a "type three" accuser as of 25 January 2018 because a reasonable person would impute to ADM Caldwell a personal feeling or interest in the outcome of the litigation. *Ortiz*, 2018 CCA LEXIS 73 at *9-10.

6. Ruling

The Defense motion to disqualify ADM Caldwell as a "type three" accuser is GRANTED. The court finds that the Defense established by a preponderance of the evidence that ADM Caldwell abdicated his neutral role in favor of a prosecutorial role when (1) he conducted the NJP hearings of CDR S.B,

²³ The *Ashby* court echoed this finding, but also noted that the charges before the court in *Ashby* arose outside of the CIB, mitigating the court's concern even further. 68 M.J. at 130. *Ashby* had been charged at an earlier court-martial for offenses investigated by the CIB. The charges at issue in the second court-martial were never considered by the CIB. *Id.* at 129.

²⁴ 10 U.S.C. § 815 (a); JAGMAN § 0106(c), *supra* note 15.

CMDCM B.B. and LTJG W.C, and (2) he commented on the accused's guilt in his show-cause submission pertaining to CAPT J.B. The court finds that these actions disqualifies ADM Caldwell as a "type three" accuser, thus resulting in an improper referral. R.C.M. 504(c)(1). However, the court finds that dismissal of the charges is not necessary to effect an appropriate remedy in this case. *Ortiz*, 2018 CCA LEXIS 73 at *18 (citing *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004)(noting that "dismissal of charges is a drastic remedy requiring courts to look to see whether alternative remedies are available.")).



J. T. STEPHENS
CAPT, JAGC, USN
Military Judge